after the commencement of the building sub-lease, when there was still a period of 7½ years (including the option period) to run during which the appellant could carry out the proposed development. Once again, the Collector must have referred to these matters as relevant to his valuation of the appellant's interest at nil; and their Lordships consider that, to take them into account without at the same time adverting to the effect of the compulsory acquisition and the length of the unexpired period of the building sub-lease shows that here again the Collector erred in fact or in law.

Their Lordships further accept the appellant's submission that it was not for the appellant, on the hearing of the preliminary issue before the commissioner, to adduce evidence relating to the value of his interest in the land. As is shown by the agreed order made by the Commissioner, that matter was for consideration at a later stage in the proceedings. The whole purpose of the preliminary issues heard by the Commissioner was to determine whether the Collector's award could stand; if it could not, the way was open for negotiations between the appellant and the trustees or, failing that, an investigation by the Commissioner of the market value of the appellant's interest. Their Lordships consider that this manner of proceeding was not only well intentioned, but also sensible; and they regret that an initiative intended to achieve a realistic valuation of the parties' respective interests with a minimum of further delay and expense should, in the outcome, have been productive of the very delay and expense which it was designed to avoid.

Their Lordships accordingly allow the appeal. The Collector must pay the appellant's costs before their Lordships, and the Collector and the trustees must pay his costs before the Court of Appeal and before the Board. The question of law posed by the Commissioner for the Court of Appeal (viz whether he was correct in law in making his order) must be answered in the negative, and the matter must be remitted to the Board, to enable the Commissioner to proceed with the remaining issues on the basis that, on the second issue submitted to him, the Collector erred in concluding that the appellant's interest in the land was of nominal value worth only $1. Their Lordships earnestly hope however that, after all the delay that has occurred, the matter can now be disposed of as between the appellant and the trustees by mutual agreement.

Appeal allowed.

Solicitors: *Kingsford Stacey; Turner Kenneth Brown; Taylor Joynson Garrett.*

Reported by *Rosalind Tan*

SINGAPORE REPORTS

Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 55 OF 1989
YONG PUNG HOW CJ, CHUA AND KARTHIGESU JJ
3 APRIL 1991

Contract — Building contract — Payment of interim certificates — Deductions — Whether appellants entitled — SIA Conditions cll 1(7) & 30 (4)

Contract — Building contract — Interest — Whether respondents entitled to interest from due dates of payments of interim certificates — SIA Conditions, cl 37(6)

The respondents were engaged by the appellants as the main contractors in a condominium development of townhouses at Gilstead Road, Singapore ('the project') under a contract in writing dated 23 June 1983 incorporating the standard terms and conditions of the Revised Standard Form of the Singapore Institute of Architects together with additional conditions and addendum ('the conditions of contract').

The respondents' claim was for judgment under 12 interim certificates of payment for the sum of $1,785,294.32 with a further claim of $504,711.47 as contractual interest. The appellants applied for a stay of the proceedings pursuant to s 7 of the Arbitration Act (Cap 10, 1985 Ed) on the ground that the conditions of contract contained an agreement to arbitrate the matters in respect of which the action was brought whilst the respondents applied for summary judgment. The assistant registrar dismissed the respondents' application and granted the appellants a stay of the proceedings. The respondents then appealed to the judge who allowed the appeal, gave them judgment for $1,266,010.32 together with interest at 8% pa from the date of commencement of the action to the date of judgment; and ordered a stay of the balance sum of $519,284 of the respondents' claim. [See [1989] 3 MLJ 216.]

The appellants appealed against that part of the judgment giving judgment to the respondents in the sum of $1,266,010.32 and by a respondents' notice, the respondents sought to vary the judgment. However, shortly before the hearing of the appeal, the appellants filed a notice of withdrawal of their appeal. The appeal was heard by the court with regard to the respondents' notice. The issues before the court were: (1) whether on the true interpretation of the contract provisions, the appellants are entitled to deduct from the amounts certified by the project architects as due and payable to the respondents under an interim certificate(s) of payment, (a) sums of money which the appellants claim to have expended on the rectification of defective works which the respondents have failed to rectify and which amounts are purportedly certified by the project architects, and, (b) sums of money which the appellants claim to have paid to nominated sub-contractors directly and which amounts are purportedly certified by the project architects; (2) whether on a true interpretation of the contract provisions, the respondents are entitled to the payment of the interest from the date each of the amounts certified in the interim certificates of payment was due to date of judgment and if not whether the learned judge exercised his discretion correctly in awarding interest only from the date of commencement of the action.

Held , varying part of the judge's judgment:

(1) The Certificate of Cost of Other Contractor's Work dated 16 December 1987 lacked the essentials to qualify as a valid certificate under cl 1(7). The certificate was couched in vague terms and the omission to certify that the work has been done and the extra cost for doing the work is crucial to the validity of the certificate. There can be no doubt that cl 1(7) of the conditions of contract requires a certificate of a definite amount as the extra costs of the works carried out by the 'other contractors' which the contractors have failed to do following a written notice to comply with written directions or instructions. Accordingly the certificate was not valid.

(2) The Certificate of Non-Payment dated 16 December 1987 was valid notwithstanding reference in the body of the document to 'sub-contractors' without the qualification 'nominated' or 'designated'. The project architects were doing no more than following the wording of cl 30(4) since the certificate was issued to effectuate deductions pursuant to cl 30(4). The certificate is also not vitiated if one of the contractors named in the list attached therewith was in fact not a nominated sub-contractor. It would be perfectly proper for the name entered in error to be deleted and the amount to be deducted, adjusted accordingly.

(3) The exercise of the power to grant interest from the due dates of each of the interim certificates of payment the appellants were in default of is discretionary. The judge had applied his discretion correctly as he had taken into account the conduct of the parties in determining whether interest should run from date of accrual of the causes of action or from the date when the action was commenced.

Cases referred to

1 *Gilbert-Ash (Northern) Ltd* v *Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 (refd)
2 *Token Construction Co Ltd* v *Charlton Estates Ltd* [1973] 1 BLR 48 (follD)
3 *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)* [1982] 1 All ER 925 (refd)

Appeal from: Suit No 2423 of 1987 (High Court, Singapore)

Koh Juay Kherng for the appellants.
Warren Khoo (Susan Lim with him) for the respondents.

Cur Adv Vult

Karthigesu J (delivering the judgment of the court): The plaintiffs/respondents ('Tropicon Contractors') were engaged by the defendants/appellants ('Lojan Properties') as the main contractors in a condominium development of townhouses at Gilstead Road, Singapore ('the project') under a contract in writing dated 23 June 1983 incorporating the standard terms and conditions of the Revised Standard Form of the Singapore Institute of Architects together with additional conditions and addendum ('the contract'). The standard terms and conditions of the Revised Standard Form of the Singapore Institute of Architects incorporated into the contract together with the additional conditions and addendum are referred to as 'the conditions of contract'.

Tropicon Contractors' claim as formulated by the statement of claim dated 9 September 1987, was for judgment under 12 interim certificates of payment, numbers 17 to 28 issued by the 'project architects' dated between 19 September 1984 to 16 January 1987. The amount due under these 12 interim certificates less a sum of $146,000 paid to account of the amount due under interim certificate no 17 amounted to $1,785,294.32. Tropicon Contractors also claimed a sum of $504,711.47 as contractual interest under the contract and continuing until the date of judgment or payment.

Lojan Properties applied for a stay of the proceedings pursuant to s 7 of the Arbitration Act (Cap 10, 1985 Ed) on the ground that the contract contained an agreement to arbitrate the matters in respect of which the action was brought whilst Tropicon Contractors applied for summary judgment of the amounts claimed. The assistant registrar who heard both applications together,by separate orders,dismissed Tropicon Contractors' application for summary judgment and granted Lojan Properties' application for a stay of the proceedings. Tropicon Contractors then appealed to the judge (Thean J) who allowed Tropicon Conractors' appeal; gave them judgment for $1,266,010.32 together with interest at 8% pa from the date of commencement of the action (9 September 1987) to the date of judgment (18 May 1989); and ordered a stay of the balance sum of $519,284 of Tropicon Contractors' claim 'which the parties may refer to arbitration'. The sum of $519,284 was made up of two sums, namely, $381,791 which Lojan Properties claimed to have expended on rectification of defective works which Tropicon Contractors failed to rectify under the terms of the contract and $137,493 which Lojan Properties claimed they had paid directly to the nominated sub-contractors, both of which, if established, would entitle Lojan Properties, the right of deduction from the amounts due under the interim certificates of payment.

The judgment of Thean J is reported at [1989] 3 MLJ 216.

Lojan Properties appealed against that part of Thean J's judgment giving judgment to Tropicon Contractors in the sum of $1,266,010.32 and by a respondents' notice Tropicon Contractors sought to vary Thean J's judgment. However shortly before the hearing of this appeal Lojan Properties filled a notice of withdrawal of their appeal. The appeal was heard by us with regard to the respondents' notice.

During the course of the hearing, Tropicon Contractors' counsel applied to us for leave to amend the respondents' notice. We granted leave. The respondents' notice as amended reads as follows:

Take notice that, on the hearing of the above appeal, the respondents abovenamed will contend that:

(A) That part of the decision of The Honourable Mr Justice LP Thean whereby he held that the defendants were entitled to deduct from the plaintiffs' claim the sum of $381,791 being alleged cost of alleged rectification of defective works, and the sum of $137,493 being alleged payment to nominated sub-contractors, should be varied so that no part of such sum is deducted from the plaintiffs' claim, and that judgment be entered for the plaintiffs in the sum of $1,785,294.32 with interest ascertained in manner contained below.

(B) That part of the decision of the learned judge whereby he awarded the plaintiffs interest at the rate of 8% per annum from the date of commencement of action to the date of the judgment should be varied so that interest at the said rate from the date each of the amounts certified in the interim certificate nos 17 to 28 was due to date of judgment.

Thus the issues which arise for our consideration are:

(1) Whether on the true interpretation of the contract provisions Lojan Properties are entitled to deduct from the amounts certified by the project architects as due and payable to Tropicon Contractors under an interim certificate(s) of payment,

(a) sums of money which Lojan Properties claim to have expended on the rectification of defective works which Tropicon Contractors have failed to rectify and which amounts are purportedly certified by the project architects, and

(b) sums of money which Lojan Properties claim to have paid to nominated sub-contractors directly and which amounts are purportedly certified by the project architects.

(2) Whether on the true interpretation of the contract provisions Tropicon Contractors are entitled to the payment of interest (the rate is no longer in issue) from the date each of the amounts certified in the interim certificates of payment was due to date of judgment and if not whether the learned judge exercised his discretion correctly in awarding interest only from the date of commencement of the action.

A curious feature of this case is that long after the practical completion of the project and indeed while the applications for summary judgment and stay were pending the project architects were 'persuaded' by Lojan Properties to review the interim certificates of payment and the 'extension of time' certificates previously issued. The project architects then revised interim certificate nos 12 to 28 by issuing replacement interim certificate nos 12A to 28A and a new interim certificate no 29. The consequence was that there now arose a massive liquidated damages claim of $792,000, when previously it was $362,000, a claim for the costs of remedying defects of $347,000 and a claim for $137,493 being a direct payment to nominated sub-contractors, the total of which would exceed the claim of Tropicon Contractors.

In a carefully considered judgment the learned judge held that the replacement interim certificate nos 12A to 28A as well as the new interim certificate no 29 were invalid; that the project architects' decision that the previous extensions of time for the main building works to 31 December 1984 were 'null and void' on the ground that Tropicon Contractors had not given the requisite notice under cl 23(2) of the conditions of contract was unsustainable; that the purported extension of time for the main building works to 31 May 1984 purportedly given under cl 23(3) of the conditions of contract was flawed and therefore invalid; that the delay certificate was not issued in compliance with cl 24(1) of the conditions of contract and was therefore invalid; that the issue of a valid 'delay certificate' was an essential requirement of cl 24(2) of the conditions of contract to found a claim for liquidated damages and accordingly neither the earlier liquidated damages amount of $362,000 nor the latter one of $792,000 had been validly certified; that on the true interpretation of cl 31(1) and 31(11) 'only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate'; and accordingly 'neither the amount of $362,000 nor the amount of $792,000 can be maintained as liquidated damages and be set off against the amount due to the plaintiffs' (ie to Tropicon Contractors).

With these findings and the reasoning leading to them we are in total agreement.

The conditions of contract as its very name suggests is a revised version of the former Singapore Institute of Architects Conditions of Contract and differs in many essential respects from it and from the RIBA and JCT forms of contract on which the former Singapore Institute of Architects Conditions of Contract was modelled. The unique features of the Conditions of Contract are that the contractor is assured of regular periodic payments during the period the contract works are in progress based on a retrospective revaluation of all work carried out under the contract (see cl 31(1) and (2)) and subject to the exceptions mentioned in cl 31(11) the contractor is put in a position to enforce payment if payment is not made on the due date by action in the courts. On the other hand the employer's rights are equally protected in that he is entitled legitimately to deduct his legitimate claims against the contractor during the progress of the works provided that the claims themselves and the amounts due are certified by the architect. See cl 31(11) and cl 1(7) for defective works, cl 24(2) for liquidated damages and cl 30(4) for payment to nominated sub-contractors. Further the arbi-

tration clause (cl 37) envisages that the courts and not an arbitrator may be seized of a dispute thus negativing a stay in the event an action is brought in the courts to recover payment under an interim certificate of payment. Both the courts and the arbitrator are given power to order repayment of moneys overpaid by either party to the other whether the overpayment was under a mistake of fact or of law (see cl 37(7)). The financial machinery under the conditions of contract is regulated by the certificates of the architect, the effectiveness of which until determined otherwise by a court or an arbitrator is preserved by cl 37(3)(g). Most important of all the conditions of contract read as a whole and cll 31(11), 1(7), 24(2) and 30(4) make it particularly clear that the common law defence of set-off or counterclaim are no longer available to the employer in a claim for payment of an interim certificate of payment.

The foregoing are but some of the unique features of the Conditions of Contract which the learned judge clearly appreciated as can be seen from the admirably precise manner in which he addressed himself at p 220, 2nd col, between letters C and E of the report of his judgment. He said:

> It is intended (referring to cl 31(11)) that the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by he employer it is intended to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate. I therefore come to the conclusion that subject to any deduction or set-off as provided expressly in the contract, the amounts certified in the interim certificates are due and payable to the plaintiffs.

The learned judge dealt extensively with the deduction of the liquidated damages claimed by Lojan Properties and quite rightly disallowed it but fell into error when he came to deal with the deduction claimed by Lojan Properties for the alleged cost of the rectification of defective works which it was claimed Tropicon Contractors had failed to rectify under the terms of the contract.

In dealing with the deduction for the cost of rectification of the defective works the learned judge felt unable to say whether the certificate issued by the project architects under cl 1(7) of the conditions of contract was invalid. He also was unable to say whether or not Lojan Properties were entitled to the $381,791 claimed. He therefore concluded by saying: 'All that can be said, and that I need to say, is that the defendants (Lojan Properties) have certainly raised an arguable claim for this amount, and under cl (7) this amount, if established, is deductible from the amount due to the plaintiffs (Tropicon Contractors)'.

Learned counsel for Tropicon Contractors took issue with the learned judge on this. He submitted that the learned judge in basing this part of his judgment on 'an arguable claim' lost sight of the scheme of the contract providing for the regulation of all deductions by means of certificates. He should have proceeded on the basis, as he had correctly formulated in the earlier part of his judgment, that only amounts expressly deductible under the contract may be set off against the amounts due under the interim certificates. Counsel further submitted that the document entitled 'Certificate of Cost of Other Contractors' Work' was not a valid certificate within the meaning of cl 1(7) of the conditions of contract; that the project architects had not certified an amount or indeed any amount as being deductible by their 'certificate of cost of other contractors' work'; that the amount of $381,791 appeared only in interim certificate no 29 which the learned judge had already held was an invalid certificate; that the sum of $381,791 was put forward as an estimate of the remedial work by Cheong Min Tet, a director of Lojan Properties, in the affidavits he filed in these proceedings; and that there was no evidence that the remedial works by the other contractors engaged by Lojan Properties had been completed.

Clause 1(7) of the conditions of contract reads as follows:

> If within 7 days after receipt of a written notice from the architect requiring the contractor to comply with a written direction or instruction the contractor fails to do so, the employer may employ other contractors to do so under the supervision of the architect and may upon the certificate of the architect deduct the extra cost (if any) of doing so from any moneys otherwise due under the contract or recover the same from the contractor. Such certificate shall be called a 'Certificate of Cost of Other Contractor's Work', and any such deduction shall be recorded by the architect in subsequent payment certificates under cl 31 of the conditions.

The wording of this provision presents no difficulty of construction or interpretation. Its meaning is plain and straightforward. It requires firstly, a written notice from the architect requiring the contractor to comply with his written direction(s) or instruction(s); secondly, there must be a failure on the part of the contractor to comply with the architect's written notice giving the written direction(s) or instruction(s) for a period of seven days after the receipt of the architect's written notice; thirdly, and this is implicit from the wording of the provision, the employer must employ other contractors to do the work directed or instructed by the architect's supervision; and fourthly, and this too is implicit from the wording of the provision, the architect must certify that the work has been done and must also certify the 'extra cost' of doing so. Then and only then can the employer deduct the amount so certified from any moneys otherwise due to the contractor and when so deducted the

architect is required to record the deduction in any subsequent payment certificates under cl 31 of the conditions of contract.

Certainly the wording of cl 1(7) of the conditions of contract gives no room for a construction or an interpretation that the employer is given carte blanche to engage other contractors to carry out remedial work as and when he pleases and to deduct the cost or estimated cost, whatever that might be, from the subsequent payment certificates or to withhold payment of a valid payment certificate. This could never have been the intention of the parties.

Practical completion was certified by the project architects as being effected on 1 July 1985. The project architects issued their purported certificate to entitle Lojan Properties to deduct the cost of rectification of the defective works on 16 December 1987, some 2½ years later and 1½ years after the end of the maintenance period or the defects liability period, as it is sometimes called. It reads as follows:

> 16 December 1987
>
> Certificate of Cost of Other Contractors Work
>
> Pursuant to cl 1(7) of the contract conditions, I certify that the contractor having failed to comply with written notices from us dated 24 July 1985 and 14 July 1986 requiring him to comply with our written directions/instructions of the same dates, the employer has engaged others to carry out the work under our supervision and the employer may deduct the extra cost of doing this work from any moneys otherwise due under the contract or recover the same from the contractor.
>
> (Signed)
> Gan Eng Oon
>
> 16 December 1987
> Date

The written notice dated 24 July 1985 referred to in the project architects' certificate above cited refers to a site meting held on 23 July 1985 and attached four lists of outstanding defects to be completed by 30 July 1985. The first, entitled 'outstanding works — main contractor' lists 20 items; the next entitled 'Gilstead Road Condominium — defects list applicable to all units' bearing a date '5 June 1985' lists nine items; the third entitled 'Gilstead Road Condominium — public areas outstanding works/defects' bearing a date '8 June 1985' lists seven items; and the fourth entitled 'Gilstead Road Condominium — individual unit defects list' bearing a date '5 June 1985' lists various items in respect of the 11 units. The written notice dated 14 July 1986 has the subject heading '11 units maisonettes at 35 Gilstead Road' and reads: 'With reference to the above project, we wish to inform you of the following defects identified at the end of the defects liability period on 1 July 1986'. There are then listed 18 items. The notice concludes as follows:

> We enclose herewith two letters which are self explanatory (not exhibited to the court).
>
> We are not able to enter three of the units and will be forwarding a supplementary list in due course.
>
> Please inform us of your proposal to rectify the defects before you actually commence work.

Even if these written notices are proper written notices within the meaning of cl 1(7) of the conditions of contract, on which we make no observations since it was not argued before us that they were not, the certificate lacks the essentials to qualify as a valid certificate under cl 1(7). The certificate is couched in vague terms. It does not name the 'other contractors' engaged by Lojan Properties. This may not be crucial but the omission to certify, and that is what the provision implicitly requires the project architects to do, that the work has been done and the extra cost for doing the work, is crucial to the validity of the certificate. The words of the provision are — 'upon the certificate of the architect deduct the extra cost (if any) of doing so'. The mere fact of recording a figure in a subsequent certificate cannot validate an otherwise invalid certificate. All the more so, since in this case, the figure of $381,791 was not the project architects' figure at all. Furthermore the figure of $381,791 was recorded only in the interim certificate no 29 which the learned judge had already held was invalid.

The figure of $381,791 was made up of $347,000 which was given by a contract consultant to Lojan Properties in September 1987 as an approximation of 'the total assessed value of the remedial work' and Lojan Properties claimed to have paid 'to other contractors a sum of $34,791 to rectify defects in the plaintiffs' (Tropicon Contractor's) works'.

There can be no doubt that cl 1(7) of the conditions of contract requires a certificate of a definite amount as the extra costs of the works carried out by the 'other contractors' which the contractors have failed to do following a written notice to comply with written directions or instructions. Accordingly the 'Certificate of Cost of Other Contractor's Work' dated 16 December 1987 purportedly issued by the project architects to comply with cl 1(7) was not a valid certificate and in our opinion the learned judge should have so found. The learned judge was wrong to have withheld the sum of $381,791 form the judgment.

The introduction of 'an arguable claim' into this part of the learned judge's judgment was unfortunate. The scheme of the contract is clear. As we have premised earlier the intention clearly expressed in the contract is to exclude the right of set-off. See the House of Lords decision in *Gilbert-Ash (Northern) Ltd* v *Modern Engineering (Bristol) Ltd*,[1] where the right of set-off was contractually excluded. For a brief moment the learned

judge seems to have lost sight of his own clear enunciation of cl 31(11) of the conditions of contract that only amounts expressly deductible under the contract may be set off against the amounts due under the interim certificates. In our opinion the scheme of the contract is equally clear that cross-claims or counterclaims, not the subject of the architects' certification giving the right of immediate payment or deduction, are to be separately litigated or arbitrated.

Before leaving this issue of the appeal we think it right to point out that there was an alternative procedure the project architects could have followed in this case. Counsel for Tropicon Contractors pointed out that the sum of $381,791 as recorded in interim certificate no 29 (which the learned judge held was invalid) purported to include two separate items, namely, an allowance for defects pursuant to cl 27(4) of the conditions of contract and for payments to others for rectification of defects pursuant to cl 1(7). The affidavit evidence, not challenged, was that Tropicon Contractors had refused to carry out the remedial works listed in the two written directions or instructions previously referred to, both of which were given after the certified date of practical completion. In this situation it occurs to us that the appropriate course to have followed would have been under cl 27(4) which reads as follows:

> Provided that in lieu of requiring the contractor to make good defects under sub-cl (1) or (2) or exercising the powers in sub-cl (3) hereof, the architect may, in any case *where the cause is a breach of contract by the contractor* or by any sub-contractor or supplier as aforesaid, *give a direction that a defect be not remedied*, and instead that there should be a *reduction in the contract sum to be assessed by the quantity surveyor* representing the reduced value of the work to the employer, or any savings in cost to the contractor which the defective work may have involved, whichever is the greater. *Such reduction may be effected in the certificate of the architect releasing the second half of the retention money under cl 31(8) of these conditions, in a certificate issued under cl 31(4) of these conditions or alternatively shall be taken into account by the architect in his final certificate.* (Emphasis added.)

Counsel for Tropicon Contractors argued that this was the very purpose of 'retention moneys' in building contracts but then proceeding under cl 27(4) would not allow for deductions under the interim certificates of payment, which was what Lojan Properties were endeavouring to achieve.

We have already pointed out that long after the practical completion of the project and whilst the applications for summary judgment and the stay were pending the project architects were 'persuaded' by Lojan Properties, amongst other things, to review the interim certificates of payment already issued on which Tropicon Contractors' claim in these proceedings was founded. The project architects then, on 15 December 1987, issued 'revised certificates' nos 13A to 28A to replace the original interim certificate nos 13 to 28. On 16 December 1987 the project architects issued 'revised certificate no 12A to replace the original interim certificate no 12 and a new interim certificate no 29'. It cannot be gainsaid that it was this 'unprecedented' step that gave the opportunity to Lojan Properties to resist Tropicon Contractors' application for summary judgment in these proceedings.

Indeed the three items of deduction claimed by Lojan Properties all emanated from the interim certificate of payment no 29 dated 16 December 1987 and 'the certificates' issued by the project architects in support of them. The learned judge held that 'all the revised interim certificates and interim certificate no 29 were not issued in compliance with the conditions of contract' and were invalid (see the report of Thean J's judgment at p 220, 1st col, letter B). Lojan Properties have withdrawn their appeal against the judgment and thus the learned judge's disallowance of the deduction of $792,000 liquidated damages stands. We have earlier in this judgment dealt with the deduction of $381,791 for the cost of rectification of defects and now turn to a consideration of the deduction claimed in respect of the payments made directly to the nominated sub-contractors.

Interim certificate no 29 dated 16 December 1987 shows a recording of a deduction of $137,493 being 'payments made direct to sub-contractors (see list attached)'. The attached list names seven sub-contractors/suppliers with the amounts due to each of them being stated against their respective names which in fact totals $137,493 and is appended to a document dated 16 December 1987 entitled 'certificate of non-payment of nominated sub-contractor or supplier' and reads as follows:

> Pursuant to cl 30(2) of the contract conditions, I hereby certify that Tropicon Contractors Pte Ltd being the contractor under this contract has failed to make payment as required by cl 30(1) of the contract of the sum of $137,493 duly certified by me and paid or deemed to be paid by the employer to him and accordingly due from him to the sub-contractors and in the amounts shown on the attached list, and that there is no valid or reasonable justification for such non-payment.
>
> I hereby further certify that by reason of such failure to pay, the employer is entitled to pay the said sums to the subcontractors shown on the attached list and following such payment to deduct the said sums at any time from any sums subsequently certified by me as due to the contractor under this contract.
>
> (Signed)
> Gan Eng Oon
>
> 16 December 1987
> Date

The provision which deals with the right of the employer to deduct payments made directly to nominated sub-contractors from payments due to the contractor is cl 30(4) of the conditions of contract. It reads:

> Upon the issue of a certificate of non-payment the employer may, but shall not be bound to, pay some or all of any sums so certified directly to the sub-contractor or supplier named in the certificate, and having done so may (without prejudice to his and the architect's powers under cl 31(10) of these conditions) at any time thereafter before Final Certificate deduct some or all of any sums so paid from any sums due or subsequently becoming due to the contractor under this contract, or otherwise recover the same from the contractor. Any certificate of non-payment and decision of the architect which it represents shall be binding between the employer and the contractor until final judgment or award in any dispute between them relating thereto. The architect shall record any such payment direct or any subsequent deduction or recovery by the employer in any later payment certificates issued by him.

Before the learned judge counsel for Tropicon Contractors accepted that 'the certificate of non-payment' appeared to be in a form required under the conditions of contract. He conceded that he had no material to challenge the amount of $137,493. Accordingly the learned judge held that the sum of $137,493 was deductible from the amounts due to Tropicon Contractors under the interim certificates of payment. In his judgment (at p 222, 2nd col, between letters A and B) he said:

> As for the amount paid to the nominated sub-contractors, namely, a sum of $137,493, the plaintiffs (Tropicon Contractors) are not disputing this amount, and under cl 30(4) of the conditions of contract this amount is also deductible from the amount due to the plaintiffs.

Before us counsel sought and obtained leave to amend the respondents' notice by including this item and also to refer in argument to certain documents which had not been previously exhibited but copies of which had been furnished to Lojan Properties' solicitors shortly after the learned judge had delivered his judgment. Counsel now, not only challenged the validity of 'the certificate of non-payment' but also submitted that the deduction of $137,493 was tantamount to a 'double deduction or more than a double deduction' since that amount was already part of a sum of $206,032.81 deducted from the amounts due to Tropicon Contractors under interim payment certificate no 28 dated 16 January 1987. The sum of $206,032.81 is described in interim payment certificate no 28 as follows: 'This amount is subject to verification of amount paid by owner/or agreed to be paid by owner to the nominated suppliers, sub-contractors, and subject to the measurement and allowance for defects under cl 27(4).'

Counsel's challenge to the validity of 'the certificate of non-payment' was technical. He advocated for a strict compliance with the requirements of cl 30 of the conditions of contract which is sub-titled 'Payment of nominated sub-contractors and suppliers'. Since 'The certificate of non-payment' although correctly titled refers in the body of the document to 'Sub-contractors' it was submitted that 'the certificate was invalid'. We cannot agree. A careful reading of the sub-clauses of cl 30 will show that the word 'sub-contractor' is used without the qualification, 'nominated' or 'designated', at several places in the six sub-clauses of this clause. Furthermore in cl 30(4) the word used throughout is 'sub-contractors' without any qualification. In our view the project architects were doing no more than following the wording of cl 30(4) since 'the certificate of non-payment' was issued to effectuate deductions pursuant to cl 30(4). In any event the intention clearly is that 'the certificate of non-payment' applies to nominated sub-contractors only since it was issued under the provisions of cl 30. We would accept the words of Roskill LJ in *Token Construction Co Ltd* v *Charlton Estates Ltd*[2] at p 59 where he said:

> The court should not be astute to criticize documents issued by an architect merely because he may not use the precise language which a lawyer might have selected in order to express a like determination, but whilst this amount of latitude is permissible, it cannot extend to the court's treating as due compliance with contractual requirements documents which, however liberally interpreted, do not plainly show that they were intended to comply with, and, fairly understood, do comply with those contractual requirements.

A further criticism of counsel was that one of the contractors named in the list attached to 'the certificate of non-payment' was not in fact a nominated sub-contractor. There is no evidence of this except for counsel's statement from the Bar.Even if we accept this and we have no reason not to, that would not vitiate the whole document. It would be perfectly proper for the name entered in error to be deleted and the amount to be deducted, adjusted accordingly. We are fortified in saying this having particular regard to the wording of cl 30(4) and the reference to cl 31(10) which provides the machinery for dealing with outstanding balances due to nominated sub-contractors in the event of there being a dispute.

As for the sum of $137,493 certified by the project architects as being a direct payment by Lojan Properties to the nominated sub-contractors, counsel for Tropicon Contractors fell far short of satisfying us that this sum formed part of the $206,032.81 deducted from the amounts due to Tropicon Contractors under interim payment certificate no 28. Counsel produced a schedule (not verified or certified by the project architects and unsupported by the nominated sub-contractors) showing that the total agreed amount owed to all the nominated sub-contractors was $275,092 and that Tropicon Contractors had themselves paid $125,199.10 leaving a balance of $149,892 unpaid. There is obviously a discrepancy in the figures which cannot be resolved in an O 14 proceeding. Until such time as these discrepancies in the figures are resolved 'the certificate of non-payment' is binding between the employer (Lojan

Properties) and the contractor (Tropicon Contractors). See cl 30(4) of the conditions of contract set out above.

Thus in our view the learned judge correctly did not give judgment for $137,493 to Tropicon Contractors.

As an alternative argument to the above counsel for Tropicon Contractors applied to amend the statement of claim by adding t the claim the sum of $206,032.81 deducted from interim payment certificate no 28. We did not respond to this application.

The final question to be determined is whether Tropicon Contractors are contractually entitled to the payment of interest (the rate is no longer in issue) from the due dates of each of the interim certificates of payment Lojan Properties were in default and if not whether the learned judge exercised his discretion correctly in awarding interest only from the date of the commencement of the action.

Tropicon Contractors by their statement of claim pleaded cl 37(6) of the conditions of contract and claimed interest from the due dates of each of the interim certificates of payment of which Lojan Properties were in default. Clause 37(6) reads as follows:

> An arbitrator or the courts shall have power to award interest at full commercial rates in favour of the contractor to take account of under-certification or under-payment at any stage of the contract, and in favour of the employer in all cases for over-payment.

Neither party seems to have addressed the learned judge specifically on the question of interest. The written submission of Tropican Contractors' counsel has but a brief reference which reads as follows:

> The plaintiffs (Tropicon Contractors) claim the immediate payment on these certificates, outstanding for such a long time, together with interest as stated in the statement of claim and in accordance with the interest provisions of cl 37(6). Judgment should be entered for the amount and interest claimed and costs.

The case of *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)*[3] which was cited to us by counsel for Tropicon Contractors was not cited to the learned judge.

It seems to us that cl 37(6) is no more than a restatement of what the law is. However that may be this court, except in special circumstances, will not hear arguments not canvassed in the court below. Be that as it may it does not seem to us that cl 37(6) is ascribing rights to either party. As such it is our view that the exercise of power is discretionary and we will only consider whether the learned judge exercised his discretion and whether he exercised it correctly in awarding interest from the date of commencement of this action.

It is evident that the learned judge gave no reasons for the order he made on the question of interest. But we have no doubt that he must have had in mind what had gone on before the action was commenced. He set it out in some detail in his judgment (at p 217 2nd col, last para to p 218 1st col). He said:

> Under cl 31(1) of the conditions of contract read with the appendix thereto, the architects had to issue monthly interim certificates for payment to the plaintiffs, and the plaintiffs were entitled to be paid within a period of 21 days of the receipt thereof by the defendants. The architects had issued altogether 28 interim certificates, serially numbered 1 to 28, since the commencement of the works up to January 1987, and the defendants had paid the first 16 interim certificates leaving the remaining 12 certificates, namely, nos 17 to 28, unpaid. Ten of these certificates nos 17 to 26, were issued during the period between 19 September 1984 and 27 September 1985; certificate no 27 was issued on 15 December 1986 and certificate no 28, expressed as 'pre-final certificate', was issued on 16 January 1987. The total amount due under these 12 certificates was $1,931,294.32; but a sum of $146,000 was paid to account, leaving the balance of $1,785,294.32. Between June and July 1987 a series of meetings were held between the plaintiffs' and the defendants' representatives with a view to resolving the settlement of the outstanding sum owing by the defendants to the plaintiffs under the contract. Unfortunately, these were not successful, and no further payment was made. On 9 September 1987 the plaintiffs instituted these proceedings against the defendants claiming the sum of $1,785,294.32 and interest thereon.

If as we assume, and we have no reason to assume otherwise, the learned judge had this passage of his judgment in mind when he made his order on the question of interest then he has applied his discretion correctly as he has taken into account the conduct of the parties in determining whether interest should run from the date of accrual of the causes of action or from the date when the action was commenced. We cannot say that this is an improper exercise of discretion in all the circumstances of this case and will not interfere.

For reasons we have given we will vary the judgment of the learned judge to the extent that there will be judgment for the plaintiffs (Tropicon Contractors) in the sum of $1,647,801.32 with interest thereon at 8% per annum from the date of commencement of this action to the date hereto and a stay of further proceedings in relation to the claim for the balance sum of $137,493 which the parties may refer to arbitration.

Since Tropicon Contractors have succeeded only in respect of one of the three issues raised by the respondents' notice they shall have one-third of the taxed costs of this appeal.

Order accordingly.

Solicitors: *Lee & Lee; Warren Khoo & Co.*

Reported by *Kevin Mathews*